



## DELTA WETLANDS PROJECT

April 15, 2011

Mr. Phil Isenberg, Chair  
Delta Stewardship Council  
980 Ninth Street, Suite 1500  
Sacramento, CA. 95814

RE: Second Staff Draft Delta Plan Comments

Dear Chairman Isenberg and Members,

Thank you for the opportunity to comment on the Second Staff Draft Delta Plan. We are providing proposals for specific language changes as well as a brief statement of our concerns that the specific changes are intended to remedy.

First, we are concerned that the Second Draft outlines a process that holds consistency determinations indefinitely hostage to future actions to be taken by the State Water Resources Control Board and the Delta Protection Commission. That feature is inconsistent with those agencies' independent statutory authorities, potentially costly to proponents of covered actions, unreasonable, unnecessary and so broad that it could be a taking. Elsewhere, the Second Draft places considerable weight on adaptive management approaches to dealing with risk and changing circumstances. We believe that restrictions on covered actions pending action by independent entities should be narrow, specific, and accepting of the notion that the regulatory environment is ever changing.

Second, the requirements for covered actions seem designed for large, publically funded restoration projects that are related to permits, such as BDCP restoration projects, or projects specifically designed and funded to contribute to the State's coequal goals. They do not seem designed for, or appropriate for application to, other covered actions with a different or more limited purpose. The consequence of this approach is that the Plan treats large-scale projects, or projects that are part of a large-scale program, that are designed to accomplish the coequal goals in the same manner as projects with more limited scope and purpose that may only incidentally affect the accomplishment of the coequal goals. In the first case, it makes sense for projects to have a perpetual obligation to maximize their contribution to the coequal goals and to show the capacity for perpetual funding. In

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the second case, where impacts on coequal goals may be incidental to the project's purpose, the obligation should be to do no harm. Accordingly, we are suggesting a distinction between "essential covered actions" with affirmative and perpetual obligations and "other covered actions" with an obligation to do no harm. If it is desired that an "other covered action" incorporate features that go beyond its design purpose, and that it accept obligations not otherwise required by law or permit, then those additional features and obligations should be publically funded and subject to the approval of the project proponent.

Third, there needs to be clarity as to who is responsible for best available science and adaptive management. The Delta Plan Act provides that "the council shall make use of the best available science" (Water Code § 85302(g)) and that the Delta Plan shall be "based on the best available scientific information and the independent science advice provided by the Delta Independent Science Board" (*id.* § 85308(a)) and "[i]nclude a science-based, transparent, and formal adaptive management strategy for ongoing ecosystem restoration and water management decisions" (*id.* § 85308(f)). The second draft instead places a lot of this obligation on individual covered actions. We believe that this is an invitation to chaos. It is most appropriate for the Delta Plan, and plans such as BDCP that are intended to be incorporated into the Delta Plan to follow the best available science guidelines in establishing their goals, objectives, targets, and measures. Individual covered actions should be obligated to identify areas of overlap -- to identify common goals, objectives and targets -- and should only be required to address those areas of overlap (i.e., not every covered action should have to advance every goal, objective and target of the Delta Plan). By contributing to the common goals, objectives and targets a covered action should be deemed consistent with the best available science that established them. In like manner, the adaptive management framework should guide the DSC in making changes to the Plan's goals, objectives and targets, and essential covered actions should be held to adapting to their revision.

## Specific Comments

### Page 7, line 1

In addition, as appropriate for each specific project, all proposed essential covered actions will be required to adhere to the adaptive management framework described in Chapter 2. Proponents of proposed essential covered actions must describe how they intend to apply the adaptive management framework, including identification of Delta Plan goals and objectives that the project will impact, estimation of the project's contribution to each such goal and objective, a plan for measurement of project specific goal attainment, identification of adaptive actions that the project will take depending on the degree of project specific goal attainment, a commitment for communicating to the public the information learned during the monitoring and assessment of ~~implemented actions~~ project specific contribution to the attainment of Plan goals and objectives. The Council will use the improved understanding gathered through the implementation of Delta Plan covered actions and associated research to revise the Plan.

### Page 8, line 9

Accordingly, the Council has determined that the first step towards achieving the coequal goals is to halt, to the extent feasible, new or additional practices and activities within the Delta or that have an impact on the Delta which, without compensating contributions to the coequal goals:

- ◆ Further erode water supply reliability or water quality;
- ◆ Degrade the Delta ecosystem; or

- ◆ Increase risk to people, property or statewide interests.

#### Page 9, line 19

The Council will use this adaptive management framework to review and revise the Delta Plan.

In addition, as appropriate for each specific project, all proposed essential covered actions will be required to adhere to this adaptive management framework. Proponents of proposed essential covered actions must describe how the adaptive management framework will be applied, including identification of Delta Plan goals and objectives that the project will impact, estimation of the project's contribution to each such goal and objective, a plan for measurement of project specific goal attainment, identification of adaptive actions that the project will take depending on the degree of project specific goal attainment, a commitment for communicating to the public information learned from the monitoring and assessment of implemented actions project specific contribution to the attainment of Plan goals and objectives.

#### Page 10, line 1

monitoring actions, evaluating outputs and outcomes, and revising policy decisions based on improved understanding (Christensen et al. 1996, Abal et al. 2005, Healey et al. 2008). It is the policy of the Council that Delta-related plans, programs and projects that meet the definition of “essential covered action” (Water Code section 85057.5) shall, as described above, clearly describe the use of adaptive management in planning, implementation, and decision making, unless adaptive management concepts are not applicable based on the nature of the covered action contributing to the attainment of the Plan's goals and objectives. This chapter presents a framework for the application of adaptive management to proposed plans, programs, and projects. The review process and governance structure to support adaptive management are described in Chapter 3.

#### Page 14, line 5

The Council will use the adaptive management framework as described in this chapter, and other provisions of the Delta Plan and Council rules and procedures as appropriate to make decisions on covered actions and revising the Delta Plan. Flexible and responsive governance to support adaptive management is essential to achieve the coequal goals and is further discussed in Chapter 3.

#### Page 22 line 1

Submissions of Certification for Proposed Covered Actions

Essential Covered covered actions carried out, approved, or funded by other state and local agencies as part of BDCP, or other regulatory proceedings are central to achieving the coequal goals. Specific requirements regarding implementation of an essential covered action, including adaptive management and warranties, establish and clarify continuing responsibility regarding essential covered actions. They provide flexibility for agencies to satisfy the Act and to effectively implement essential covered actions for which they are responsible, allowing them to determine how to meet these responsibilities within the parameters of other legal authorities.

Other covered actions carried out, approved or funded by public or private entities for purposes other than implementing the Plan or as part of a regulatory proceeding such as BDCP may contribute to meeting Plan goals, objectives and targets. These contributions are incidental and serendipitous, but the project proponents have no obligation to make or maintain these contributions. Such covered actions must, however, be consistent with the Plan in that they not frustrate Plan actions or, on balance, make existing conditions worse.

GP P1. Any state or local agency proposing to carry out, approve, or fund a covered action shall include the following in ~~their~~its consistency finding:

- ◆ whether the proposed covered action may have a positive or negative impact on the achievement of one or both of the coequal goals or implementation of government-sponsored flood control programs to reduce risks to people and property in the Delta; and
- ◆ how the proposed covered action addresses each relevant policy of this Delta Plan, including identification of possibly accomplishing multiple policies, working effectively with other covered actions, or jeopardizing or making more difficult achieving the Delta Plan's policies and targets.

GP P2. Any state or local agency proposing to carry out, approve, or fund an essential covered action shall include the following additional information in its consistency finding:

a) ~~Information~~ All essential covered actions shall include information required to determine legal authority, financing and operational features of the proposed covered action, including at a minimum a description of:

- ◆ legal authority as it relates to the proposed covered action;
  - ◆ financing, including identified funding sources;
  - ◆ allocation of costs and risks in relationship to benefits received;
  - ◆ how the proposed covered action addresses each relevant policy ~~or recommendation~~ of this Delta Plan, including identification of possibly accomplishing multiple policies, working effectively with other covered actions, or jeopardizing or making more difficult achieving the Delta Plan's policies and targets;
  - ◆ capacity of the plan, program, or project proponent to implement the proposed covered action; and,
  - ◆ provision for addressing failure to achieve results consistent with the policy objectives of the Act.
- Authority: Water Code sections 85020(a)(h), 85022(a), 85225

b) Essential covered actions shall also include aadequate, enforceable provisions for implementation of the proposed essential covered action consistent with the Delta Plan, including the following warranties:

- ◆ The project currently complies with all ~~governmental policies~~applicable laws, regulations and permits related to its water diversion and use, water quality, ecosystem function, species protections and land use.
- ◆ All features of the proposed essential covered action will be fully implemented, including incorporation into relevant financing instruments, contracts, leases and other legal documents except as provided for in the project's adaptive management plan.
- ◆ Continuing responsibility during the life of the project for full implementation of the essential covered action shall be ensured, including provisions that guarantee continuing legal and financial responsibility or their equivalent if the proposed essential covered action is transferred to another party. Provided, however, that specific elements of the project may change through adaptive management actions.
- ◆ To fully disclose any redirected impacts to third parties that could jeopardize achieving the objectives of the Act and to implement any required mitigations in ways that support achieving the objectives of the Act. Authority: Water Code section 85225

c) It is the policy of the Delta Stewardship Council that as appropriate for each specific project, Delta-related plans, programs and projects that meet the definition of "covered action" (~~Water Code section 85057.5~~) essential covered action shall clearly describe the use of adaptive management in planning, implementation and decision making, unless adaptive management concepts are

inapplicable based on the nature of the essential covered action, including at a minimum these provisions:

- ◆ Document the proposed essential covered action's adaptive management approach and how it is consistent with the Delta Plan adaptive management framework.

- ~~◆ Document, including citations for best available science, how the proposed covered action will achieve its desired result and is consistent with the Delta Plan and meeting the Plan's targets. Authority: Water Code section 85225, 85308(a).~~

- ◆ Essential covered actions designed to achieve Plan goals and objectives should be deemed to meet the "best available science" requirement.

- ◆ Identify relevant Delta Plan performance measures and targets as well as essential covered action performance measures and targets, and specification of how this covered action will be assessed in regards to achieving those targets. Authority: Water Code sections 85211, 85308.

- ◆ Provide monitoring and analyses sufficient to determine that implementation of the essential covered action is consistent with achieving the relevant target and also to capture any effects that may help or hinder achieving the coequal goals as expressed in the Act or the Delta Plan. Monitoring and analyses should be coordinated with existing related efforts to maximize resource use efficiency and increase the potential for learning. Provide reports to the Council at least every 2 years during the life of the essential covered action. Authority: Water Code sections 85211, 85308(c).

- ◆ Provide for incorporating best available science in interpreting performance in achieving targets and as the agency makes any recommendations for changed implementation of the essential covered action. Authority: Water Code section 85308(a).

- ◆ Delineate authority by the agency responsible for the essential covered action to make decisions for any adaptive management modification of the project. Authority: Water Code section 85308(f).

- ◆ Guarantee of sufficient funds to support the full adaptive management process, including planning, implementation, monitoring, data management, analyses, obtaining the best available science, communicating results, supporting decision making, and full implementation of any changes in implementation of the essential covered action. Authority: Water Code section 85308(f).

- ◆ Guarantee and provide procedures ensuring public release of all information developed related to adaptive management, including, but not limited to, raw data, modeling, analyses, and syntheses of research findings. Authority: Water Code section 85308(f).

- ◆ Provide a legally enforceable mechanism to guarantee that the preceding adaptive management measures are carried out. Authority: Public Resources code section 29702, Water Code sections 85225.

d) Any essential covered action with a useful life of more than 10 years or a total capital and operating cost of more than \$10 million dollars over a ten year period shall include both an economic analysis and a financing plan. The Council may adopt a standard format that will facilitate Council understanding of the essential covered action's impacts on the state's economic vitality. Authority: Water Code section 85302(d)(2)

**Page 24, line 39**

The allocation of costs and risks shall be identified for an essential covered action. Authority: Water Code section 85302(d)(2)

**Page 29, line 11**

WR ~~P4~~Rn<sup>1</sup>. Water Flow Standards. The State Water Resources Control Board should review and adopt new regulatory water flow standards as follows:

a) By January 2, 2014, adopt public trust flow standards for the Delta that are necessary to achieve the Coequal Goals.

b) By January 2, 2018, adopt public trust flow standards for the Delta watershed that are necessary to achieve the Coequal Goals.

c) Reserve jurisdiction to amend any water right orders and decisions issued prior to the adoption of the public trust flow standards.

c) Prior to the date indicated in (a), the Council will utilize existing Delta flow standards. If the State Water Resources Control Board fails to act by that date, the Council will consider new projects or covered actions to be inconsistent with the Delta Plan.

**Page 24, after line 40 add**

In making determinations of consistency, the Council acknowledges that there is an inherent and unavoidable tension between the coequal goals. The Council recognizes that some covered actions (i.e., "other covered actions") may have as their fundamental purpose something other than achieving the coequal goals. While "essential covered actions" are required to advance the coequal goals, an "other covered action" shall not be required to advance either coequal goal provided that neither goal is impaired. The Council also recognizes that even essential covered actions will meet some Plan objectives better than others, and may advance some Plan objectives while impacting others. No covered action will be able to advance all Plan objectives equally. It is sufficient that an essential covered action advance the Plan's goals without rendering any unattainable. Accordingly, in making consistency determinations, the Council will seek judgment on the merits of a proposed covered action on balance, and taken as a whole.

**Page 31, line 20**

WR ~~P5~~Rn. Consistent with the Water Code transfer notice provisions, request that the State Water Resources Control Board include the following information in any published notices of proposed Future-long term water transfer agreements that depend upon conveyance through the Delta shall prepare a summary for publication 14 days prior to implementation of the transfer, including:

- ◆ A table with specific amounts of water expected to be transferred and conveyed through the Delta in different water supply-type years;
- ◆ ~~Expected capital cost debt service; and~~
- ◆ ~~Expected range of annual operations and maintenance costs.~~

**Page 31, line 28**

WR P6. Until a final Bay Delta Conservation Plan is adopted, any No-project-covered action shall proposed to be constructed within the potential alignment of a conveyance facility or Ecosystem Restoration Opportunity Area, as described in Water Code section 85057.5(c), unless the project is shall strive to be consistent with and not impair the intent of the planBay Delta Conservation Plan, present no permanent impediment to Bay Delta Conservation Plan conveyance facilities or ecosystem restoration, or the construction is required to and avoid a regulatory takingcomply with any legal requirements.

This policy is not intended, and shall not be construed as authorizing the Council or any entity

<sup>1</sup> This notation is intended to indicate that the proposed policy is more appropriately a recommendation as it affects another agency with independent authorities.



acting pursuant to this section, to exercise their power in a manner which will take or damage private property for public use, without the payment of just compensation. This policy is not intended to affect the rights of any owner of property under the Constitution of the State of California or the United States.

**Page 33, line 13**

Covered actions ~~that have ecosystem implications~~ shall ~~demonstrate that disclose whether the action may affect impacts on~~ the potential for ecosystem restoration at the elevations shown in Figure 4 and in the EMUs shown in Figure 5 (and as explained in the text) and shall strive to be consistent with and not impair such opportunities.~~have been fully considered and avoided or minimized in a way that appropriately protects the ecosystem. CEQA documentation associated with these actions shall consider the habitat values described generally in Section 2 of the Draft ERPCS~~  
This policy is not intended, and shall not be construed as authorizing the Council or any entity acting pursuant to this section, to exercise their power in a manner which will take or damage private property for public use, without the payment of just compensation. This policy is not intended to affect the rights of any owner of property under the Constitution of the State of California or the United States.

**Page 34, line 26**

ER P4. ~~State and local agencies~~ Essential covered actions that involve the constructing construction of new levees, substantially ~~rehabilitating~~ rehabilitation of levees, or ~~reconstructing~~ reconstruction of existing levees shall evaluate and incorporate, where effective, economically and technically feasible, alternatives (including use of setback levees) that would increase the extent of active floodplain and riparian habitats.

**Page 34, line 9**

ER ~~P5Rn~~. The State Water Resources Control Board should review and adopt public trust flow standards for the Delta watershed by January 1, 2018 that are protective of beneficial uses and contribute to achievement of the ecosystem restoration objectives of the coequal goals. The Board should reserve jurisdiction to amend (after notice and opportunity for hearing) water right approvals granted prior to adoption of the flow standards to be consistent with such flow standards. Pending adoption of these flow standards, any proposed projects that develop new or changed diversion patterns, or water volume, or places of use will be evaluated for consistency based on current standards. Should the standards be adopted, projects and programs will be judged for consistency using the new regulatory standards. ~~Should no new regulatory standards be adopted, projects will be deemed inconsistent with the Delta Plan.~~  
This policy is not intended, and shall not be construed as authorizing the Council or any entity acting pursuant to this section, to exercise their power in a manner which will take or damage private property for public use, without the payment of just compensation. This policy is not intended to affect the rights of any owner of property under the Constitution of the State of California or the United States.

**Page 40, line 12**

In determining consistency of land and resource uses proposed for floodprone areas, the Council shall apply the following policies:

- ◆ The ~~proposal-covered action~~ shall minimize human exposure to risks that could result in loss of life.
  - ◆ The ~~proposal-covered action~~ shall be consistent with or exceed “Levee Classifications based on Land Uses” presented in Table 7-1.
  - ◆ Flood-proofing may be used as a strategy of risk reduction, but it shall be regarded as not fully addressing risks to life, or access for emergency response, evacuation, and maintenance.
  - ◆ ~~Covered~~ Essential covered actions shall include documentation of an adequate level of flood insurance, if available and mandated by law (such as for federally-backed mortgages), for individuals, businesses, and industries, excluding protected habitat and uses that include intentional or non-destructive flooding, in floodprone areas. Flood insurance is essential to reduce the financial losses of those who are flooded. Flood insurance may help to minimize taxpayer funded recovery efforts. However, flood insurance does not reduce risks to loss of life or to disruption of public services or natural resource values of interest to the State. Reliance on flood insurance may encourage and increase exposure to risk.
  - ◆ The proposal shall not increase unmitigated risk to public services maintained by the federal, State, or local governments.
  - ◆ The ~~proposal-covered action~~ shall not increase or impose new flood damage liability on the State ~~include legally enforceable “hold harmless” provisions for the benefit of the State, if applicable.~~
- RR P3. No covered action shall be considered consistent with the Delta Plan after January 1, 2015 unless the agency has brought its Delta levee construction policies and plans into conformity with “Levee Classifications based on Land Uses,” as shown in Table 7-1. Authorities: Water Code sections 85021, 85302, 85305, 85306.

#### Page 45, line 13

~~DP P1Rn. No covered action involving any municipal, industrial, and/or agricultural development activities will be consistent with the Delta Plan until such time as the Economic Sustainability Plan prepared by the Delta Protection Commission is completed and determined by the Council to be consistent with the coequal goals.~~ The Economic Sustainability Plan developed by the Delta Protection Commission shall include, but not be limited to, the following items that address planning for:

#### Page 55, line 16

Conversion of farmed Delta islands with peat soils to natural wetlands or water bodies could provide two types of offsets. The Delta subsides at a rate of 1 to 3 inches a year, mostly in the form of carbon dioxide releases (USGS Delta Subsidence in California: the Sinking Heart of the State). The amount of CO<sub>2</sub> emissions from farmed Delta islands ~~is 2.5 to 6.5~~ is highly site specific, but can be up to 17 tons per acre per year<sup>2</sup>.

#### Page 56, line 34

Existing laws, such as Proposition 218, limit the ability of any state or local government to establish new diversion fees. Enabling legislation would be required.

<sup>2</sup> Delta Wetlands Project 2010 Draft EIR p. 4.14 based on IFC Jones & Stokes reports from 2007 and 2008.

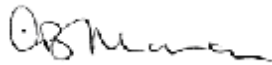


Adding to the complexity is the fact that some water is diverted more than once between its source and final place of use.

The potential for diversion fees is also limited by the inconsistency and lack of water diversion measurement in some places. Diversions are measured by a variety of methods and some diversions are not routinely measured. The costs of standardized measurement could be significant relative to the amount of fees collected.

Again, we appreciate this opportunity to comment.

Sincerely,

A handwritten signature in black ink, appearing to read "A. B. Moran", with a stylized flourish at the end.

Anson B. Moran  
General Manager